

Redefining Marriage? A Case for Caution

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Introduction

Until the early 1990s the “same-sex marriage” question was not a significant issue for public debate even within gay and lesbian circles. During the 1970/80s gay and lesbian theorists widely rejected marriage as an inherently heterosexual institution irrelevant to their concerns. Marriage sparked little interest for a movement celebrating a distinctive sexual lifestyle that broke with the constraints of heterosexual conjugality. However, since the mid-1990s there has been growing pressure for a same-sex redefinition of marriage. In these last few years the same-sex marriage movement has fuelled a sizeable body of advocacy scholarship.

David Chambers, University of Michigan Law Professor, points out that in the United States the major lesbian and gay legal authorities (ACLU Lesbian and Gay Rights Project and LAMDA Legal Defense and Education Fund) have not yet given the green light for a major legal challenge to the marriage question. While tirelessly preparing for battle, these organizations have also been actively opposing any attempts by gay or lesbian couples to file cases before the time is right. Legal strategists do not intend to fight their way to the Supreme Court without confidence of winning.[1] Yale’s eminent legal theorist, William Eskridge, a leading advocate of same-sex marriage and author of *The Case for Same-Sex Marriage*, now suggests placing the issue on a back burner for a while. In his recent study, *Equality Practice: Civil Unions and the Future of Gay Rights*, Eskridge advocates a more incremental approach to the achievement of full equality rights rather than a head-on adversarial approach that adopts an all-or-nothing approach on the issue of gay marriage.[2]

However, on the Canadian side of the border there is now a full-court press for same-sex marriage. Canada’s national gay and lesbian organization seems to have concluded that the courts are ready for a challenge. Since 1998 legal cases have been filed in Canada’s three largest provinces: Ontario, Quebec, and British Columbia. These cases are working their way towards the Supreme Court of Canada, a court that signals some openness to arguments for same-sex marriage.

Over the past few years much of the legal ammunition engineered in the United States has been hauled north to be fine-tuned and tested in Canadian courts. The legal battle got off to a rocky start for the same-sex marriage lobby when British Columbia judge, Justice Ian Pittfield, turned down the petitioners and came to the defence of the historic definition of marriage. Same-sex advocacy shrugged off this setback and pressed on. The British Columbia decision was followed by two stunning and unequivocal decisions in favour of same-sex marriage in Ontario and Quebec.

The legal arguments served up in recent provincial court decisions for same-sex marriage offer good paraphrases of positions developed by “gaylaw” theorists. It seems odd for jurists to be forging ahead with legal reconfigurations of marriage at such an early stage of debate. In the academy there has been little in the way of substantive response to this new body of argumentation and advocacy. Critical evaluation will eventually come, but perhaps too late as courts and legislatures are pushed to move. The following discussion traces a number of concerns that still remain in the shadows of our public and academic debates.

1. The Equivalence of Same-Sex and Opposite-Sex Bonding?

A key argument for same-sex marriage advocacy stresses the “unitive” over the “procreative dimension” of marriage. This argument reduces the discussion of the “unitive” dimension to diffuse notions of loving affection and intimacy between two persons. However, it fails to mention that the “unitive” dimension of marriage refers to the joining of sexual difference, rather than combining sexual sameness. Sex-difference and opposite-sex attraction and bonding are fundamental features of human existence. Marriage is an institution that attempts to work with this vast and complex domain of social life. It provides a crucial bridge of social-sexual intimacy for male-female bonding. This unique and ever-evolving institution constantly struggles adapt to changing social and cultural contexts in order to nurture stable conjugal unions that span the sexual divide between men and women.

The significance of this central task of marriage is pushed off the table in contemporary debates. Advocates of same-sex marriage make much of the fact that “researchers” discover “no difference” between homosexual and heterosexual relationships when it comes to the basic dynamics of love, compatibility and intimacy. This argument for the similarity of all committed sexually-bonded relationships grounds recent court judgments. In the Ontario Superior Court decision

supporting same-sex marriage, Justice Robert Blair echoed this view stating that “marriage must be open to same-sex couples who live in long-term, committed, relationships — marriage-like in everything but name — just as it is to heterosexual couples.”[3]

The scholarly authorities cited to support this thesis are typically proponents of “close relationship theory,” a relatively new model of relationships that explicitly focuses on the “common” dynamics in all close sexually bonded relationships.[4] The underlying principle of close relationship theory is that all close dyadic relationships operate according to the same dynamics and values. Close relationship theory bleaches out the significance of embodied sexual difference and argues that all committed sexual bonds should be “subsumed under the broader construct of close or primary relationships.” [5]

This slanted academic approach reflects broader cultural trends. According to Anthony Giddens, Britain’s most renowned sociologist, popular culture is creating a new grammar of intimacy. In *The Transformation of Intimacy* and, more recently, in the prestigious Reith Lectures, Giddens argues that we are moving from a “marriage culture” to a culture which celebrates “pure relationship.” A “pure relationship” is a relationship that has been stripped of any goal or end beyond the intrinsic emotional, psychological, or sexual satisfaction that the relationship brings to the adults involved. In this new world of “relationships,” marriage is placed on a level playing field with all other long-term sexually intimate relationships. Similar values and processes govern their initiation, maintenance and dissolution dynamics. Marriage does not merit special consideration or attention. Accordingly, exploration of the distinctive conjugal character of marriage tends to be pushed aside in favour of a more general discussion of the dynamics of initiation of any close relationship.[6]

Not surprisingly this model is fine-tuned to discover exactly what it predicts, namely that same-sex couples reveal the same patterns of interpersonal intimacy evident in opposite-sex couples. But these core values out to be true for all relationships: sibling relationships, friendships, opposite-sex unions, parent-child attachments, same-sex unions, and so on. By inflating the notion of the “unitive” to this generic interpersonal intimacy we bracket out the specificity of marriage as a form of life struggling with the unique challenges of bonding sexual difference. Close relationship theory is not designed to generate conceptual insight into fundamental facets of human life: the fact of sexual difference; the significance of sexual complementarity; the important place of male/female bonding in human life; the procreativity of heterosexual bonding; the unique social ecology of heterosexual parenting which bonds children to their biological parents; and the rich genealogical nature of heterosexual family ties.

A public discourse that screens out any meaningful recognition of the remarkable significance of human sexual dimorphism (male/female) and reproduction in human life must entail a fundamental change in the way marriage is viewed. The “close relationship” paradigm is relatively new, barely a generation old. To date it has not been subject to any sustained or critical evaluation within the academy. Critical review will come since the limitations of this approach are glaring. However, in the meantime close relationship theory already is beginning to seriously shape legal thinking about marriage and family law. The pervasive influence of this approach can be seen in recent recommendations and reports by the Law Commission of Canada, *Beyond Conjuality: Recognizing and Supporting Close Personal Adult Relationships* (2001) and the American Law Institute, *Principles of the Law of Family Dissolution* (2002).

The inability of current academic theories to recognize significant differences between forms of homosexual and heterosexual bonding, differences that generate very disparate social ecologies, should raise serious questions about the conceptual blinders of these theories.[7] Our courts and legislatures should resist pressure to build law on views and theories that may be new and fashionable, but still awaiting the tests of time and rigorous academic debate. This is particularly so when these new theories and perspectives seem so oddly out of step with core features of marriage pervasive throughout history and across cultures.

2. History of Same-Sex Marriage?

A second key talking point for same-sex marriage advocacy attacks the universality of the opposite-sex definition of marriage by pointing to some historical examples of same-sex marriages. This contribution rarely alerts the reader as to the rarity of these exceptions, nor the significant scholarly debates over their meaning. Also, it fails to mention that the

few scholars who have delved into this area such as John Boswell and E.J. Graf are gay and lesbian scholars whose interpretations of the historical evidence are, at best, problematic and laden with advocacy.

In two major studies Boswell advanced a number of claims that are regularly trotted out as accepted academic wisdom.[8] For example, Boswell challenges the notion that the Bible prohibits “homosexual conduct.” He argues that scriptures do not have a concept of individuals with a homosexual nature or orientation. Therefore, the bible cannot be prohibiting “homosexuals” from engaging in homosexual conduct since the modern concept of homosexual was non-existent. This curious piece of exegesis leads to the conclusion that the Bible is, in effect, only prohibiting homosexual acts by heterosexuals.

Boswell also tries to get some mileage out of the rich discourse on “friendship” in the Christian tradition. His analysis of friendship covenants (*adelphopoiia* – “making into a brother”) in Eastern Christianity suggests that they were used as a vehicle for ritually blessing gay marriages.

Boswell’s arguments have been subject to critique by both biblical exegetes and medieval historians. While these kinds of historical constructs remain, at best, of dubious value, nevertheless have been rapidly crystallized into a neat body of advocacy historiography that get trotted out in legal and public forums as arguments for “precedent.” We now talk glibly about “the history of same-sex marriage.”[9] Yet does such a “history” exist? And how do we weigh it against the universality and pervasiveness of “heterosexual” marriage across human history and cultures?

3. Dismissing Heterosexual Procreativity?

A third key argument dismisses attempts to affirm the procreative nature of marriage. The recent federal brief by the Canadian government appealing the Ontario judgment in favour of same-sex marriage did try to defend marriage as a social context for the procreative power of heterosexual bonding and the rearing of children. The media reaction has been one of swift and sneering impatience. John Fisher, executive director of Egale, describes the federal brief as an attempt to portray marriage as nothing more than a “breeding program for heterosexuals” and dismisses it as “completely offensive.” *Le Devoir* ran a headline story with the dismissive title “Mariage = procréation” (Sept 19, 2002). It shrugged off the federal brief as a futile attempt to refuse marriage to gays by an argument that effectively disenfranchises all infertile heterosexuals.

According to this line of argument, the existence of infertile married heterosexuals means a slam-dunk for legitimizing ‘homosexual marriage.’ The logic runs as follows: if infertile heterosexuals are in, then procreation is out; if procreation is out, then same-sexers are in. Human cultures and religions have always consistently vigorously affirmed the intrinsic procreative nature of marriage, while, at the same time, extending the marriage to infertile and post-fertile heterosexuals. Same-sex advocates refuse to enquire why this is so; they simply leap to the conclusion that there is mere silly contradiction here.

Could there be good reasons for this extension? First, there is a fundamental difference between the ‘infertility’ of some heterosexual couples and the ‘impossibility’ of all same-sex couples to procreate through same-sex bonding. Male/female pair-bonding is the procreative mainframe for human life (6 billion people on the planet are a product of this heterosexual bonding). Even gay theorists such as Richard Mohr do offer a condescending nod to “different-sexers” as the “breeders” of the species.

Same-sex advocacy seems to suggest that various forms of sexual bonding are neutral and fairly irrelevant in regards to procreation—mere matters of choice. But is this true? Are heterosexual and same-sex bonding equivalent in relationship to the question of procreation? Heterosexual bonding typically demands the deployment of a significant battery of technological instruments and societal policies (contraception, abortion, education against teen pregnancy) to contain and constrain the profoundly procreative nature of opposite-sex bonding. On the other hand, for same-sexers the dilemma revolves around the essentially non-procreative nature of their sexual acts. One must deploy far more complex array of technological and social interventions (surrogacy, sperm donors, assisted reproduction) to work around the non-procreativity of same-sex bonding. Same-sex bonding must, of necessity, employ a third party in order to meet the opposite-sex requirements for human procreation.

Furthermore, to depict the linkages between marriage, opposite-sex bonding, and procreation in the rigid literal way that same-sex advocates suggest would force us to conclude that heterosexual couples are only truly 'married' during the three or four "fertile" days in woman's cycle. There is also an age disparity in male and female fertility. Marriage must be malleable enough to capture the procreative variables in human heterosexual bonding. Accordingly, all human societies have affirmed the basic procreativity of heterosexual pair-bonding and have extended marriage to long-term opposite-sex bonds without attempting to work through specific cases. Consider the incredible morass involved in attempting to sort out heterosexuals according to various levels of fertility and infertility (it's rarely simply either/or). In short, to contend that this extension of marriage to all heterosexuals is a negation of the significance of heterosexual procreativity is both inaccurate and misleading. It is a classic example of not seeing the forest for the trees. The public affirmation of the procreative nature of marriage endorses the procreativity of heterosexual marriage as an institution, not specific incidents.

Finally, marginalizing procreation as a defining feature of marriage is an example of the imposition of model of marriage that is fully consistent with same-sex experience but inconsistent with heterosexual experience. Procreativity is an inherent, though variable, feature of the heterosexual conjugal experience; non-procreativity is an inherent non-variable feature of same-sex experience. William Eskridge concedes this point when he argues that,

The gay experience has been systematically different from the straight experience. Because same-sex intimacy is disconnected from procreation, it is more purely connected to other values, such as self-expression, bonding with another person, and pleasure. Without an anchor in procreation, same-sex intimacy is more openly committed to sexual diversity than different-sex intimacy is. ...[10]

The same-sex marriage project imposes a definition of marriage that conforms law and public policy to same-sex experience.

4. "For the Sake of Children"?

A fourth line of argument insists that gay marriage is "for the sake of the children." Gay couples do have children either through previous heterosexual relationships, adoption, surrogacy, or reproductive technologies. Same-sex advocates maintain that the recognition of same-sex marriage helps to stabilize and affirm the relationship of the children to their same-sex "parents." Gay marriage is good for the kids of same-sex unions. (Census data does indicate that the number of children in this category is minimal.)[11]

However, there are some striking differences between the nature of the parent-child connection in same-sex unions and in opposite-sex unions. The gay marriage project must, of necessity, begin to sideline ties between biological parents and children. The gay marriage project must also press for full access to new assisted reproductive technologies in order to technologically facilitate lesbian reproduction or surrogate parenting procedures for gays.

Candid same-sex advocates recognize that the gay marriage project entails fundamental shifts for children. William Eskridge concedes (celebrates) the fact that building law upon gay experience,

...involves the reconfiguration of family—de-emphasizing blood, gender, and kinship ties and emphasizing the value of interpersonal commitment. In our legal culture the linchpin of family law has been the marriage between a man and a woman who have children through procreative sex. Gay experience with "families we choose" delinks family from gender, blood, and kinship. Gay families of choice are relatively ungendered, raise children that are biologically unrelated to one or both parents, and often form no more than a shadowy connection between the larger kinship groups.[12]

This disconnect between progeny and natural parents is the new legal vision of marriage that has emerged out of the Ontario and Quebec judgments in favour of same-sex marriage. They define marriage as consisting of only two defining features: the unity of the couple and the rearing of children. In this view, the procreative link between the marital bond and children completely drops out of view, as well as the genealogical rights of children inherent in the definition of marriage as a heterosexual bond. Parenthood is redefined a functional activity that has no inherent relationship to procreation.[13]

Across all cultures the institution of marriage works to support the ties of natural parents to their progeny. It provides broad public affirmation and support for this type of parental ecology. In doing so it also enshrines a basic birth-right of children to know, to be connected to, and to be raised by their natural parents. It enshrines this right in a robust but malleable way (with the possibility of adoption for exceptions to the rule).[14] The United Nations Convention on the Rights of the Child states that, “the child shall ... have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.” (Art. 7) This right also implies that children should not to be the subjects or products of experimental reproductive technologies that may have long-term effects on life, health and identity that remain as yet unknown.

Children have a birth-right to be connected to their natural parents, to be connected to their biological mothers and fathers. This is a right for all children, for gay children and for straight children. The movement for extending marriage to same-sex couples signals a society now uncertain or unwilling to publicly affirm or support this fundamental familial dimension of our social ecology.

5. The Value of Change – Marriage Expansion?

Another line of argument stresses the fact that marriage has changed over history, constantly expanding to provide more universal access. The Law Commission of Canada’s report *Beyond Conjuality*, quotes lesbian journalist E.J. Graff (Brandeis University) on the endless variability and malleability of marriage throughout history. If marriage has changed before, why not change again? Furthermore, gay marriage advocates argue that the underlying principle of this ongoing change seems to be one of constant expansion of the personal right and freedom to marry: to marry in or outside of one’s clan, to marry in or outside of one’s race, to marriage in or outside of one’s religion, and finally, to marry in our outside of one’s sex.

The argument is pre-programmed to point to the *Loving vs. Virginia* decision repealing certain U.S. state laws prohibiting interracial marriages. Just as marriage was extended to include interracial unions, now it should be extended to same-sex unions. In Eskridge’s words: “People revolted by different-race marriage were wrong. Likewise, people revolted by same-sex marriage are wrong.”[15]

This celebration of change fails to distinguish between changes that contribute to the development and viability of an institution and changes that destabilize and erode the integrity of an institution.[16] The *Loving vs. Virginia* decision is a good example of “development.” State laws enacted to prohibit interracial marriage were legal “changes” clearly inconsistent with the fundamental purposes of marriage. Such laws hitched marriage to inappropriate and immoral purposes: e.g. “to preserve the racial integrity of its citizens,” and to prevent “the corruption of blood,” “a mongrel breed of citizens.” (*Loving v. Virginia*). Attempting to redefine marriage so as to impose upon the institution the task of racial segregation actually restricts the capacity of opposite-sex partners to marry and clearly distorts the basic purpose of marriage.

The repeal of the anti-miscegenation laws led to more clarity since it re-focused marriage on its task of supporting long-term opposite-sex bonding. *Loving v. Virginia* clearly underscored the principle that one of the fundamental tasks of marriage is procreative (“an institution fundamental to our very existence and survival.” *Loving v. Virginia*). In short, this decision reinforces the core elements of marriage (opposite-sex bonding and procreativity). Same-sex marriage, on the other hand, requires us to deflate the category of marriage to a form of long-term sexual-bonding that deletes the centrality of opposite-sex bonding and procreativity from its defining characteristics.

Furthermore, good changes have not always meant expansion. The development of marriage has, at times, meant restrictions rather than expansions of institution. These restrictions target categories that fail to meet a basic purpose of marriage. For example, the fairly widespread practice of polygamy was prohibited as cultures came to stress the monogamous nature of heterosexual pair-bonding. The restriction of marriage to pair-bonding makes sense in the light of the dyadic nature of heterosexual reproduction.[17] The recent report of the Law Commission of Canada, *Beyond Conjuality*, is already hinting that their new legal category of ‘close personal relationship’ should not be “limited to two people.” The report insists that flexibility on this question is necessary because “the values and principles of autonomy and state neutrality require that people be free to choose the form and nature of their close personal adult

relationships.”[18]

In the modern period legal reforms have placed age restrictions placed on the capacity of adolescents to marry. Child marriages and incestuous unions were consistently excluded from the marriage category since these categories undermine the maturity and the familial distance required for responsible consent and procreation. Same-sex unions were excluded since they lacked the sex-difference essential to the unique nature of marriage as a conjugal union geared to long-term heterosexual bonding and procreativity.

Finally, changes may work to erode rather than develop the integrity of institutions. In recent decades legal and political interventions into marriage may have contributed to a destabilization of the institution. The disconnect between procreation and marriage has been driven home so hard that demographers now worry about the social and economic implications of the steep declines in birth-rates.

Marital permanence is central feature of the conjugal bond. The steep declines in conjugal permanence over recent decades have seriously altered marriage and family culture. Judith Wallerstein’s acclaimed study of the effects of divorce on children points to the complete absence of serious research into the possible impact on children in the construction of no-fault divorce legislation during the late sixties. During this period experts assured us that divorce reform would not adversely affect divorce rates, it would only make it easier for hard-pressed divorcing couples to exit from unworkable relationships. However, divorce rates did spike upwards far beyond any predictions.[19] Social science research indicates high divorce rates entail large private and public costs. Sober assessments of the impact of divorce on children and spouses are just beginning to emerge. This research may point in new directions for law and public policy.[20]

Marriage has changed, but its core features have remained recognizable across cultures, religions, and history. Across all cultures marriage has been a unique and evolving form of life that struggles to negotiate the challenges of long-term opposite-sex bonding. It bridges the sexual divide within the human species. It is a procreative bond that generates human life through the biological fusion of sex difference. It promotes a social ecology that supports the rights of children to know, to be connected to, and to be in a stable relationship with their natural parents. It is a genealogical bond that reaches back into time through its ancestors and forward to the future through its descendants. It fosters rich and complex lines of kinship that weave through human community. This complex social institution does need ongoing change and development to uphold these characteristics of marriage, not to dismantle them. The social ecology of conjugality can only be shaken and destabilized, not developed, in the push for a “one-shoe-fits-all-sizes” reconfiguration of marriage that deletes heterosexuality from its core definition.

6. The Depth and Breadth of the “Same-Sex” Marriage Demand?

Same-sex marriage advocacy emphasizes a sense of urgency for change; it draws attention to the yearnings of a very significant community of gay and lesbian couples for inclusion. The Beyond Conjugality report by the Law Commission of Canada celebrated the growing diversity of conjugal relationships in Canada. In particular it pointed out that “available data” indicates that “a significant minority of Canadian households consist of same-sex couples.” It cites one federal study that “estimated” that approximately 270,000 persons were living in same-sex relationships in 1994.[21]

First, the historical depth of this desire for same-sex marriage is open to debate. This demand was not on the agenda of gay and lesbian activists during the 1970s and 80s. Even today there is division in gay and lesbian communities about the push for marriage. Some express strong reservations about efforts to corral gay and lesbian life-styles into the constraints and respectability of marriage. The increasing demand for gay marriage is, to some extent, the product of recent advocacy. The inclusion of this issue into gay politics has contributed to a political construction of heightened expectation and desire.

Second, the perception of a fairly “significant minority” needing inclusion is simply not born out by the data. After assuring us that there was a large community of same-sex couples to attend to, the Beyond Conjugality report noted that the 2001 Canadian census would finally offer us reliable data. However, the comprehensive census data seriously challenges any claims to the existence of any “significant minority” of gay and lesbian couples. These inflated estimates seem to reflect the popular urban myth set in motion by Alfred Kinsey that 10% of human beings are same-sex

orientated.[22] Census data indicates that same-sex couples represent less than one percent (.05) of all couples in Canada (married and cohabiting). Same-sex couples constitute a minute fraction of Canadian couples. These numbers are consistent with recent census data from other Western countries.[23]

This data should raise some questions. How deep and longstanding is the desire for marriage among gay and lesbian couples? How demographically significant is this sector of the community? Will redefinition of the institution of marriage really contribute much to gay and lesbian life?

On the other hand, we do know that opposite-sex yearning for marriage is exceedingly deep and broad. Despite the destabilization of this institution in recent generations, marriage remains pivotal to the aspirations of a vast majority of young men and women.[24] Are law and public policy seriously attending to the significance and place of marriage in the lives of this crucial segment of the public? Will this redefinition risk further destabilization of an institution vital to heterosexual identity and life (the 99.5% of couples)?

‘Traditional’ Marriage Imposes a Religious Concept of Marriage

This argument characterizes monogamous heterosexual marriage as an ideological concept of marriage rooted in religious doctrines. By receiving the stamp of law the state establishes a confessional view of marriage upon society. Nancy Cott makes this argument in her historical analysis of the imposition of a Christian model of conjugal monogamy on the American polity.[25] In her view, the separation of church and state should entail cleansing law of any theological vision of marriage. In *Beyond Conjugal Love* the Law Commission of Canada builds on Nancy Cott’s argument for disestablishment:

Borrowing the term from the history of church and state, Nancy Cott has described the transformation in the relationship between marriage and the state in the United States as “disestablishment”. Just as the state does not recognize a single, officially established church, no longer is any single, official model of adult intimate relationship supported and enforced by the state.[26]

In his recent overview of developments in Canadian family law, Nicholas Bala characterizes the “permanent, monogamous, marriage, nuclear, heterosexual” definition of marriage as “an explicitly Christian concept of marriage.”[27] In this view, the current heterosexual definition of marriage legally imposes a particular theological or religious vision of marriage on society that violates the convictions of sexual dissenters and nonconformists.[28] There are visions of conjugality. The vision of marriage as a “union of two persons” rather than a sex-bridging union is a view propounded by a small sector of religious communities such as the Unitarians, the gay and lesbian Metropolitan Community Churches, and, most recently, the United Church of Canada.

But then, how would a redefinition of marriage consistent with the sexual philosophies of these dissenting traditions, that is, marriage as “a union of two persons,” offer any escape from the dilemma of publicly mandating a particular vision of marriage? To redefine marriage as a “union of persons” rather than the sex-bridging union held by most faith traditions would legally impose one sectarian vision of marriage as the new public theology for society as a whole. This publicly mandated vision of marriage would now favour a nonconformist vision of marriage supported by some denominations but violate the convictions of many other significant traditions. The imposition of this ‘union of two persons’ vision does not disestablish marriage but merely creates a new established ‘doctrine’. If this is the case, then the marriage debate must end in stale-mate.

Conflating religion and marriage ineluctably leads to the conclusion that marriage should be separated from the state. The removal of marriage as a legal category is one of the options now being considered by the Canada’s Standing Committee on Justice in its hearings on the question of same-sex marriage. Many religious constituencies are now seriously questioning whether this option might be preferable to a full-fledged legal re-definition of marriage. The political regulation of marriage was a relatively late development in the history of Western law; perhaps it’s time for the state to get out of the marriage business.

Perhaps. On the other hand, the problem with this whole discussion may lie in a conceptual confusion that meshes religion and conjugality, a conflation that deflects the debate in the wrong direction. Sexuality and religion are distinct domains of human life. The huge and complex slice of human experience constituted by heterosexual bonding, procreativity and natural parent-child connectedness cuts right across all religions as well as non-religious traditions and cultures. In a real sense, marriage is bigger, prior and more elemental to human life, than religion.

Marriage has been a public cultural frame for grappling with this massive human reality. And religious traditions have been major cultural players struggling with marriage. They tussle over its significance and offer very different theological grammars to explore its meaning. Marriage may be deeply coloured by religion, however, it is not the creation of religions. Marriage is rooted in a procreative social-sexual ecology of heterosexual bonding. Human conjugal life is more than some form of sexual “soul-mating” theology conjured up by particular religions.

8. Does Exclusion from Marriage Denigrate Same-Sex Unions?

Same-sex marriage advocacy condemns the failure to extend marriage to same-sex unions as exclusionary and denigrating—constituting, in effect, a public declaration that gay relationships are “unworthy”. Eskridge makes much of the “exclusionary” argument. He argues that the refusal of gay marriage creates a form of apartheid that denies public recognition to the relationships of a whole class of persons. Exclusion based on race would be racism; exclusion based on sexual orientation is “heterosexism” or “compulsory heterosexuality”.[29] The Beyond Conjugal report notes that for same-sex couples this exclusion “represents a rejection of their personal aspirations and the non-recognition of their personhood.”[30]

This line of argument was put forward in the Ontario decision. Justice Harry LaForme states, “Excluding gays and lesbians from marriage...declares an entire class of persons unworthy of the recognition and support of state sanction for their marriage.” To extend benefits to same-sex unions and deny marriage “really imports nothing more than tolerance – it is not the equal of full acceptance.”[31] LaForme maintains that marriage extends society’s highest approval to close relationships; the denial of the right to marry thereby signals society’s disapproval of those relationships. Judge Lemelin concurs citing the “appalling” separate but equal doctrine.[32] In the words of an applicant in the Quebec case, “Marriage is the gold standard in terms of social respectability.”[33]

The notion that marriage is the benchmark of social recognition for close human relationships seems bizarre. Human relationships are far too diverse and too complex. They cluster in many different classes of relationships: friendships, collegial relationships, professional relationships, sibling relationships, domestic partnerships, sexual relationships, spiritual relationships, same-sex relationships, and more. In many traditions there are forms of human relationship that are ranked above marriage (e.g. celibate or “consecrated” life in the Catholic tradition). To speak of marriage as the “gold standard” for close relationships skews social reality.

Does opposite-sex marriage create an apartheid like sexual regime. Even leading gaylaw theorists such as William Eskridge are beginning to point to the “inaptness” of the apartheid analogy.[34] Institutions of apartheid and racial segregation are “separate-but-grossly-unequal” regimes. This is not the situation of homosexuals in most liberal democratic regimes: homosexual relationships are accepted as lawful; there is no social segregation of homosexuals; homosexual relationships are, in large part, equivalent to non-married heterosexual relationships; increasingly through redefined cohabitation laws, domestic partnerships, and civil unions, same-sex relationships share the same benefits as married opposite-sex relationships. According to Eskridge, these kinds of emerging arrangements represent a “different but equal” regime compatible with liberal values.[35]

However, Eskridge’s analysis of “civil unions and the future of gay rights” also raises a caution. In his opinion, the incremental movement to practical legal equality between same-sex unions and marriage is a pragmatic strategy establishes the legal principles and practice for dissolving the distinction between these categories. Societies legislating civil unions are societies are heading down the aisle towards same-sex marriage. If this is true then those arguing for sustaining opposite-sex marriage must also think more carefully about the implications of proposing marriage-equivalent civil unions.[36]

The institution of marriage struggles to deal with a particular class of human relationships marked by needs and challenges for long-term intimacy and sexual bonding that reach across the sex divide. This “class” of sex-bridging relationships has unique features, e.g. its natural and powerful capacity for procreation. Supporting and sustaining healthy long-term heterosexual bonding is a massive and difficult project in human society. An institution such as marriage cannot do all things for all relationships without losing its internal integrity and direction. To allow marriage to focus on its defining purposes is not to deny or denigrate other kinds of relationships.

9. No Difference? Little Impact?

Finally, same-sex marriage is presented as a relatively innocent “add on” for the gays and lesbians who want to be “married”; this “add on” will make little or no difference to heterosexuals. But can this be true? In human societies marriage has been a unique vehicle for culturally affirming or valorizing a special role of a particular type of heterosexual bonding. The proposal to delete heterosexuality from the definition of marriage clearly changes the internal meaning of the institution of marriage and will inevitably affect the life and identity of those shaped and sustained by this institution. Thoughtful gay and lesbian theorists admit this. Lesbian theorist Ladell McWhorter puts it well pointing out that if gay people are

...allowed to participate as gay people in the communities and institutions they [heterosexuals] claim as theirs, our presence will change those institutions and practices enough to undermine their preferred version of heterosexuality and, in turn, they themselves will not be the same. They [heterosexuals] are right, for example, that if same-sex couples get legally married, the institution of marriage will change, and since marriage is one of the institutions that supports heterosexuality and heterosexual identities, heterosexuality and heterosexuals will change as well.[37]

Anthropology alerts us to the fact that communal institutions like marriage are not just functional mechanisms to fulfill individual needs and aspirations. They are rich and multilayered realities with internal purposes that speak to complex needs for meaning and identity within human community. Michel Foucault, the brilliant postmodern theorist, contends that marriage has fostered a particular type of heterosexual identity, namely the “conjugal self.”[38] Marriage has been the complex cultural site for heterosexual bonding. A rich history and a complex heritage of symbols, myths, theologies, traditions, poetry, and art have clustered around the marital bond. Marriage encodes a unique set of aspirations into human culture: permanent opposite-sex bonding, procreativity, and parent-child connectedness. Changing core features of marriage must impact the self-identity of those whose lives are shaped by this institution.

The gay marriage project requires deep change to the core identity of marriage (“the lawful union of one man and one woman to the exclusion of all others”). In order to collapse the distinction between same-sex union and opposite-sex marriage you have to reconfigure the institution of marriage by carving off a number of key concerns critical to the heterosexual experience and meaning of marriage. Many same-sex advocates celebrate the fact that inclusion of gay and lesbian experience will be “subversive.” Minimally, it forces a deflation of the marriage category that must bleach out central features of marriage from law and public policy: a) marriage as a cultural affirmation and support for the unique place of opposite-sex bonding in the human community; b) the sex-opposite character of conjugal categories (husband/wife; father/mother); c) the significance of the procreative dimension of conjugal bonding; d) the public affirmation and protection of the unique connection between children and their natural parents. In effect, the inclusion of gay and lesbian unions forces the law and public policy to re-tune marriage and family to same-sex experience.

A deep redefinition of this core feature (male/female union) of marriage is similar in nature to other efforts to redefine marriage through the inclusion of a fundamentally new category. The Mormon marriage project entailed the deletion of a core feature of marriage (the dyadic nature of marriage) in order to inflate marriage to include the category of multiple-partner relationships. William Eskridge notes the similarity between the gay marriage project and the Mormon marriage project. He argues that the legal and political condemnation of the Mormon marriage project was an unjust and repressive form of “Kulturkampf” similar to current exclusionary laws against homosexual unions.[39]

Persons of diverse sexual identities and communities have a fundamental right to dignity and respect. One may put forward alternative visions of sexual identity and develop alternative communities and structures to sustain that identity. That is certainly an option within a pluralistic community. However, these alternative constructions should not be predicated on deconstructions or reconstructions of institutions critical to the sexual identity and life of other citizens. To use legal or political mechanisms to hack into an institution vital to the 'conjugal identity' of the heterosexual 'community' and to reconfigure that institution to serve a very different type of sexual identity, puts forward an aggressive claim that goes far beyond concerns for dignity and respect.

Even passionate advocates of inclusion have seriously questioned this claim to marriage as an indispensable "right" or "remedy" for same-sex persons.[40]

Mutual respect and recognition should not subvert the right of others to maintain and foster the integrity of their own unique institutions. And no institution has been more central, more vital, to heterosexual life and identity than marriage. This point is conceded on all sides of the debate. The same-sex marriage project places a claim by one social group upon an institution key to the identity of another social group. Legal and political proposals to fundamentally redefine an institution so central to the sexual identity and life of so many citizens do not represent the inevitable progress of fundamental human rights. These proposals represent a misapplication of rights that can only serve to further the ongoing destabilization of an institution vital to the social ecology of heterosexual life.

Conclusion

Liberal democratic polities should work together for a society that treats all persons, whatever their sexual orientation, with profound dignity and respect. However, upholding dignity and respect for gays and lesbians does not require assent to demands for the reconstruction of an institution fundamental to heterosexual bonding and critical to the social ecology of the human life.

Legal tampering with core features of marriage has social repercussions.

Legalization of polygamy had significant ramifications for the social ecology of marriage in polygamous societies. In our own recent experience, the liberalization of divorce laws did have significant outcomes for spouses and children that we are only just beginning to assess.

The same-sex marriage project requires a redefinition of the core features of marriage. On both sides of the debate there is widespread recognition that this reconfiguration will impact marriage and the ways in which heterosexual identity is shaped by marriage. Predicting the exact ramifications of this revolution is difficult. But previous history indicates that when core features of marriage are tampered with (e.g. polygamy and divorce) we can safely predict that the impact will be significant. Same-sex marriage advocacy regularly repeats the mantra "show us the harm." Those who challenge the gay marriage demand are expected to deliver hard evidence of some form of future possible harm. But perhaps, as we consider a fundamental reconfiguration to the legal character of marriage, the shoe should be on the other foot. There are vital concerns that need serious and sustained deliberation.

How intellectually sound are the new perspectives and paradigms informing current legal and public policy proposals for the redefinition of marriage, parenthood, and family?

What will the future hold for a society no longer able to offer any special recognition in law or public policy for a form of social-sexual bonding so central to human experience?

Will the required deflation of the meaning of marriage to long-term adult-sexual bonds serve to further destabilize this institution, confuse its social significance for future generations, and deflect it from its central purposes?

Will the inclusion of same-sex unions force the ratification of a reproductive revolution that will end any semblance of public commitment to maintain a relationship between children and their natural parents?

Will this redefinition of marriage set new precedents and principles in motion that will wrench open the door for

further challenges, e.g. pressure for non-monogamous multiple-partner marriages already the subject of serious discussion in gay and lesbian circles?

Aside from Canada, no court in the world has decided that the opposite-sex definition of marriage violates fundamental rights and freedoms. Even the Holland Supreme Court rejected this view and left it to the Holland legislature to do its own revamping of marriage. In the Ontario decision for same-sex marriage Justice Laforme denounced any attempt to argue for the social uniqueness (“superiority” in his slant) of heterosexual bonding. He declared such views “repugnant.” What if the courts in effect condemn the opposite-sex definition of marriage as repugnant, hateful and discriminatory? What if a new authoritative norm of marriage is imposed upon public life? Would this new judicially-mandated concept of marriage effectively stigmatize all future efforts to speak to or promote the historic, but now “repugnant,” opposite-sex vision of marriage in public discourse or education?

This may be the time for sober-minded second-thoughts. A zealous layer of advocacy scholarship has crystallized around the demand for same-sex marriage over the last ten years. It is very thin ice for legal and political decision-makers to be skating on. The drive to reconstruct this crucial institution makes an emotive appeal to values of “tolerance,” “inclusion”, and “diversity.” These values may be appropriate for refereeing functional and political associations, but they may be completely inadequate for handling the complex and primal conjugal reality of marriage.

[1] See David L. Chambers discussion of LAMDA’s legal strategies in “Couples: Marriage, Civil Union, and Domestic Partnership” in *Creating Change: Sexuality, Public Policy, and Civil Right*. edited by John D’Emelio, William B. Turner, Urvashi Vaid, New York: St. Martin’s Press, 2002, p.281-304.

[2] William N. Eskridge Jr. , *Equality Practice: Civil Unions and the Future of Gay Rights* New York: Routledge, 2002. Eskridge’s contention that civil unions lay the legal groundwork for future developments was born out by the Quebec Superior Court ruling on same-sex marriage. Justice Louise Lemelin notes that the difference between marriage and the newly created Quebec “civil unions” is a difference in name only. She concludes that denying gay couples the name ‘marriage’ when they already have the substance of marriage through ‘civil unions’ amounts to little more than an odious “separate but equal” doctrine. (*Hendricks and LeBoeuf v. Quebec*) A similar view was expressed by Justice LaForme in the Ontario decision: “Any “alternative” to marriage, in my opinion, simply offers the insult of formal equivalency without the Charter’s promise of substantive equality.” (*Halpern v. Canada*)

[3] *Halpern v. Canada*, para. 32

[4] For example, Eskridge’s argument for the similarity of same-sex and opposite-sex relationships cites as his authorities the research of close relationship theorists Letitia Anne Peplau and Susan D. Cochrane (“A Relationship Perspective on Homosexuality” in David P. McWhirter et al., *Homosexuality/Heterosexuality: Concepts of Sexual Orientation*. New York: Oxford University Press, 1990. (Eskridge, *The Case for Same-Sex Marriage*, 109, fn.6).

[5] John Scanzoni, et al. *The Sexual Bond: Rethinking Families and Close Relationships*. Newbury Park: Sage Publications, 1989. p.9. For an analysis and critique of close relationship theory see, Daniel Cere “Courtship Today: The View from Academia” in *Public Interest* Spring, 143 (2001).

[6] Anthony Giddens, *The Transformation of Intimacy*. Stanford CA: Stanford University Press, 1992; Anthony Giddens, *Reith Lectures*, 1999.

[7] On these disparate social ecologies see William Eskridge Jr. *Gaylaw: Challenging Apartheid in the Closet* Cambridge Mass. Harvard University Press., 1999, p. 11

[8] John Boswell. *Christianity, Social Tolerance, and Homosexuality* Chicago, IL: University of Chicago Press, 1981; *Same-Sex Unions in Premodern Europe*. New York, NY: Villiard Books, 1994

[9] See William N. Eskridge Jr., "A History of Same-Sex Marriage," in *The Case for Same-Sex Marriage: From Sexual Liberty to Civilized Commitment* New York: Free Press, 1996, ch. 2.; E.J. Graff, *What is Marriage For? The Strange Social History of Our Most Intimate Institution*. Boston Mass.: Beacon Press, 1999. Eskridge argues that same-sex marriage has been sanctioned in some non-western cultures: see William Eskridge, "A History of Same Sex Marriage," 79 *Virginia Law Review* 1419, (1993) 1510-11. However, careful scrutiny of Eskridge's examples suggests a very different conclusion. Some cultures have tolerated same-sex unions, but they have never sanctioned same-sex marriage. See Peter Lubin & Dwight Duncan, "Follow the Footnote or the Advocate as Historian of Same-Sex Marriage," 47 *Catholic University Law Review*. 1271 (1998) 1324-25.

[10] William N. Eskridge Jr., *Gaylaw: Challenging Apartheid in the Closet* Cambridge Mass. Harvard University Press., 1999, p. 11

[11] The 2001 census data indicates that there are 32,400 same-sex couples in Canada. Only a very small fraction of these couples (15% of lesbians and 3% of gays) have children.

[12] William N. Eskridge Jr., *Gaylaw: Challenging Apartheid in the Closet* Cambridge Mass. Harvard University Press., 1999, p. 11

[13] This new view of parenthood has wider and controversial legal implications, some of which are explored in the American Law Institute's report on the Principles of the Law of Family Dissolution.

[14] Current legislation in Quebec dealing with sperm donation places the rights of adults over the rights over the rights of children to know their biological parents.

[15] William N. Eskridge Jr., *The Case for Same-Sex Marriage: From Sexual Liberty to Civilized Commitment* New York: Free Press, 1996, p. 109.

[16] In the modern era there has been a concerted effort to cleanse marriage of its patriarchal elements. Social critics argue that this baggage is irrelevant to the core purposes of marriage, unnecessarily burdens the institution of marriage, and distorts the interpersonal nature of the male/female bond.

[17] In 1972 the U.S. National Coalition of Gay Organizations drew of a list of basic demands for legal reform. One central item was "the repeal of all legislative provisions that restrict the sex or number of persons entering into a marriage and extension of marriage to all persons who cohabit regardless of sex or numbers." (quoted from Eskridge, *Equality Practice* 2002, 5)

[18] Law Commission of Canada, *Beyond Conjuality: Recognizing and Supporting Close Personal Adult Relationships* , Ottawa, 2001. p. 133, fn.16.

[19] Judith Wallerstein, Julia M. Lewis, Sandra Blakeslee. *The Unexpected Legacy of Divorce* New York: Hyperion, 2000. There is a debate whether divorce reforms merely reflected or reinforced a "culture of divorce." However, even cautious analysts argue that "no-fault divorce" was one contributory factor to the rise in divorce rates. See L. Friedberg, "Did Unilateral Divorce Raise Divorce Rates?" *American Economic Review* 88 (1998) 608-627. The scholarly debate on divorce is far from over.

[20] Even William N. Eskridge Jr., a liberal legal theorist and same-sex marriage advocate, argues that no-fault divorce reforms have "diluted" marital commitment and deserve a sober second look. Eskridge is also sympathetic with "covenant marriage" proposals that establish contracts "with greater commitment." *Equality Practice*, 124.

[21] *Beyond Conjuality*, p.3.

[22] This misleading perspective dates from Kinsley's poorly researched, but popular, text on male sexuality published in 1948 (Kinsey, A. C., Pomeroy, W. B., and Martin, C. E. *Sexual behavior in the human male*. Philadelphia: Saunders, 1948). Carefully designed research on large representative samples concludes that only 2.8% of men identify themselves as gay and 1.4% of women identify as lesbian. These rates of gay and lesbian identification coincide with rates for exclusive same-sex experience (3% for men and 1.6% for women) (see Laumann, E. O., Gagnon, G. H., Michael, R. T., and Michaels, S. *The social organization of sexuality: Sexual practices in the United States*. Chicago: University of Chicago Press, 1994). Other researchers using more sophisticated statistical analysis of data sources have reached similar conclusions. Black et al. (2000) estimate that only 4.7% of adult men and 3.5% of adult women have engaged in at least one same-sex experience. Of that number only 2.5% of men and 1.4% of women had engaged in exclusively same-sex activities over the year preceding the survey. (Dan Black, et al., "Demographics of the Gay and Lesbian Population in the United States: Evidence from Available Systematic Data Sources," *Demography* 37 (May 2000).

[23] About one percent in the United States and about half of one percent in New Zealand.

[24] Recent surveys indicate an increasing majority young women (80%) and men (72%) cite stable marriage as a key aspiration that is "extremely important" to their happiness and well-being. Survey data also indicates that young people are more pessimistic about their actual ability to achieve this goal in today's society. Research also indicates that other forms of heterosexual bonding (e.g. cohabitation) compare poorly to marriage on a whole range of indicators. *The State of Our Unions: The Social Health of Marriage in America*, National Marriage Project, Rutgers University, 2000; David Popenoe and Barbara Dafoe Whitehead, *What Young Adults Need to Know About Cohabitation Before Marriage: A Comprehensive Review of Recent Research*. Second Edition National Marriage Project, Rutgers University, 2002

[25] Nancy F. Cott, *Public Vows: A History of Marriage and the Nation*, Cambridge Mass.: Harvard University Press, 2001.

[26] Law Commission of Canada, *Beyond Conjugal: Recognizing and Supporting Close Personal Relationships*. 2001, 128

[27] Nicholas Bala, "Context and Inclusivity in Canada's Evolving Definition of the Family" *International Journal of Law Policy and the Family*. 16(2002) 147.

[28] See Janet R. Jacobsen and Ann Pelegrini, *Love the Sin: Sexual Regulation and the Limits of Tolerance*. New York: New York University Press, 2003; Larry C. Backer, "Religion as the Language of Discourse of Same Sex Marriage" *Capital University Law Review*. (2002) 221-278)

[29] William Eskridge, *The Case for Same-Sex Marriage: From Sexual Liberty to Civilized Commitment* New York: Free Press, 1996, 165-67.

[30] *Beyond Conjugal*, p.129

[31] *Halpern v. Canada* para. 202, 260.

[32] *Hendricks and LeBoeuf v. Quebec*, para. 134.

[33] *Hendricks and LeBoeuf v. Quebec*, para. 18.

[34] William Eskridge, *Equality Practice*, p. 139-47.

[35] Eskridge views civil unions as an attempt to meet the needs of gay, lesbian, bisexual, and transgendered (GLBT) persons rather than segregate them. (Eskridge *Equality Practice* 2002, 141-42) The Vermont *Baker v. State* decision "deliberated about same-sex marriage or unions in a way that treated GLBT people as citizens whose distinctive as well as normal lives merited respectful analysis." The intention of civil unions was to move towards "substantial equality," to narrow and eliminate "the gap between rights accorded married different-sex couples and those unioned same-sex couples." (142-43). Eskridge notes that there is a basic "difference between the separate-but-grossly-unequal regime of racial segregation and the different-but-substantially-equal regime of civil unions". (144)

[36] Eskridge sees civil unions as a very positive step that moves us away from an “apartheid of the closet” towards a full equality that will ultimately only be realized with the advent of same-sex marriage. (Eskridge 2002, 145-47). He sees it as a pragmatic move, an equitable compromise, in the gradual movement towards complete equality. (Equality Practice 2002, 145-47)

[37] Ladelle McWhorter. *Bodies and Pleasures: Foucault and the Politics of Sexual Normalization*. Bloomington: Indiana University Press, 1999. p.125.

[38] Michel Foucault, *The History of Sexuality*, vol.3, New York: Vintage, 1988, p.72-80.

[39] William N. Eskridge Jr., *Gaylaw: Challenging Apartheid in the Closet*, p.296.

[40] In Canada the former vice-president of the Quebec Human Rights Commission, Maurice Champagne was instrumental in having sexual orientation added to the Quebec Human Rights Charter. However, he sounded a note of alarm when the same-sex marriage challenges were launched in 1998. Champagne argued that the struggle for a more open and inclusive society doesn't entail this project of redesigning the social core of marriage. “Just Asking...” *The Gazette*, Montreal Sat. April 25, 1998, B10. This article was co-authored by Maurice Champagne and a group of professionals working in the areas of psychology, social work, status of women, and the family and human rights.